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IN THE

Supreme Court of the United States

October Term, 1966

No. 646

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

against

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDICES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding.

Opinions Below

The opinions issued by the Court of Appeals are reported at —— F.2d —— and are printed in Appendix A, hereto. The unreported judgment of the Court of Appeals is printed in Appendix B, hereto.

The opinion of Respondent, Federal Power Commission and its original order herein are reported at 33 F.P.C. 739 and are printed at pp. 721-743 (R. 16538-16552) of the Joint Appendix (vol. II) submitted to the Court below, nine copies of which are filed herewith pursuant to Rule 21, par. 4, of this Court. The FPC Opinion and Order Denying Rehearing are reported at 33 F.P.C. 1252 and printed at pp. 767-769 (R. 16590-91) of the Joint Appendix (vol. II). The FPC Presiding Examiner's decision is reported at 33 F.P.C. 752 and printed at pp. 633-717 (R. 16154-16228) of the Joint Appendix (vol. II).

Jurisdiction

The judgment of the Court of Appeals was dated July 13, 1966 and entered on July 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Commission's use of one standard for judging prehearing discovery applications by its Staff (materiality and relevancy) resulting in almost unlimited discovery, and its use of a different standard for judging such discovery applications by Petitioner (need to know) resulting in a complete denial of discovery, was consistent with the requirements of either Section 12 of the Administrative Procedure Act (5 U.S.C.A. §1011) or due process of law.

2. Whether the Commission denied Petitioner a fair hearing by its repeated in-hearing foreclosure of attempts

by Petitioner to show (1) that the sales in question had for years been considered by the Commission Staff, the only source of continuing expert knowledge of the subject, to be in intrastate commerce and not subject to federal regulation, and (2) that the conclusions advanced for the first time in this case to support jurisdiction were not accepted by certain of those only other experts in the field in question.

3. Whether, under a statute (Federal Power Act §201, 16 U.S.C. §824) defining electric energy transmitted in interstate commerce as such energy which has been transmitted from a state and consumed at a point outside thereof, wholesale sales of electric energy may be determined to be "in interstate commerce" and therefore subject to federal jurisdiction (Federal Power Act §201) "where a public utility participates in and is dependent upon an integrated interstate power pool" (R. 16538), and without proof "that out-of-state energy reaches the wholesale customers" (*infra*, p. 8a).

4. Whether, if proof "that out-of-state energy reaches the wholesale customers" is required to prove that sales are in interstate commerce, "substantial evidence" (Federal Power Act §313(b), 16 U.S.C. §825*l*(b)) of such fact is provided by (1) proof of electric characteristics of interconnected system operation which it was conceded to the Court below did not prove that out-of-state energy reached the individual wholesale customers, and (2) a method of hour-by-hour analysis predicated upon data which its sponsoring witness conceded "do not even suggest or tell what happened during the hour for which the data were used" (R. 1785).

5. Whether the exemption from federal jurisdiction of "facilities used in local distribution" (Federal Power Act §201, 16 U.S.C. §824) which has been declared to be "a limitation on FPC jurisdiction" over "sales of electric energy at wholesale in interstate commerce" (*F.P.C.* v. *Southern California Edison Co.*, 376 U. S. 205, 210 n. 6) is a limitation on FPC jurisdiction over sales of electric energy at wholesale in interstate commerce.

6. Whether, in any event, the Federal Power Act, despite Congress' and the Commission's expressed views to the contrary, confers upon the Commission jurisdiction to regulate sales constitutionally subject to regulation, and in fact regulated, by State authorities under the tests prescribed by this Court (*Peoples Natural Gas Co.* v. *Public Serv. Comm'n*, 270 U.S. 550).

Statutes Involved

The Fifth Amendment to the Constitution of the United States, insofar as it is here relevant, provides that "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *" The following statutes and their official citations are printed in Appendix C, hereto, *infra*:

Sections 201, 205, 206, 307, 308 and 313(b) of the Federal Power Act, 16 U. S. C. §§824, 824d, 824e, 825f, 825g and 825*l*(b).

Section 12 of the Administrative Procedure Act, 5 U. S. C. A. §1011.

Rule 23(a) of the Federal Power Commission's Rules of Practice and Procedure, 18 C. F. R. §1.23(a).

Statement

The proceeding which led to the 2-1 decision of the Court of Appeals was commenced on April 16, 1963, by an order (pursuant to Sections 205, 206, 308 and 309 of the Federal Power Act) for Indiana & Michigan Electric Company,* Petitioner herein, to show cause why certain sales by it of electric energy should not be held to be in interstate commerce and subject to the regulatory jurisdiction of the Commission (R. 5-10).**

Petitioner is an investor-owned electric utility, incorporated, owning most of its property, and doing most of its business, in the State of Indiana, but also serving a small number of customers in the southwest corner of the State of Michigan (R. 1210, 1214, 1225-26, 12484). It is affiliated with five other investor-owned electric utilities in what is known as the American Electric Power System, a holding company system having varying kinds and sizes of generating units interconnected by transmission lines spanning seven states and operated on a coordinated basis to provide the capacity and energy necessary to meet the many particular demands for electric energy placed upon the system (R. 1119). Although part of the American Electric Power System, Petitioner has capacity of its own for generating electric energy in the State of Indiana substantially in excess of the demand for such energy placed

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* Sometimes referred to herein as "I & M".

** Section 201 of the Federal Power Act provides that the Commission shall have jurisdiction over "* * * the transmission of electric energy in interstate commerce and * * * the sale of electric energy at wholesale in interstate commerce. * * * The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction * * * over facilities used in local distribution. * * *".

on its system by its customers in Indiana and Michigan (R. 3037).

All electric energy transactions between Petitioner and other public utilities with whom it is connected are effected pursuant to contracts which have been filed with and regulated by FPC since at least 1945 (R. 1288-1294, 14451-14893).

Petitioner serves some 300,000 customers (R. 1214), including 14 municipal electric systems and seven rural electric cooperative systems in Indiana and two municipal electric systems and one rural electric system in Michigan (R. 1230). Most of the service to such municipal and cooperative customers is at wholesale for resale and has been reported annually by Petitioner and its predecessors to the Commission since 1938 (R. 1297-99); the rates for such sales have been regulated by the Public Service Commissions of Indiana (since 1924) and Michigan (since 1927) (R. 1304-05). It is the sales to these wholesale customers of Petitioner which are at issue herein.

Over a five-month period prior to formal hearings, the Commission's Staff conducted extensive investigations of the facilities and records of Petitioner, of American Electric Power, and of other utility companies. Pursuant to orders and subpoenas issued by the Commission and its Hearing Examiner, the Staff procured many thousands of documents relating to I & M's and a number of other companies' operations (R. 16-22, 151, 178-79, 493-500, 507-31). Staff's requests for such orders and subpoenas were tested against the standards prescribed for such discovery by Commission Rules of Practice and Procedure (18 C. F. R. §1.23(a))—relevancy and materiality—with one exception.*

* The Hearing Examiner did on one occasion (R. 563-77) order I & M to produce documents even after a finding (R. 574-75) that their relevance and materiality had not been demonstrated.

During the same period, I & M, recognizing that (in the words of the Commission's expert witness) "* * * the field of jurisdiction, or engineering involving jurisdiction, is very specialized and very narrow * * *" (R. 1564), and that the only source of continuing authoritative knowledge in this "very specialized and very narrow" field of engineering was the staff of the Commission, sought by numerous applications to discover from various Commission sources certain engineering studies, reports and other data pertaining to whether sales for resale were "in interstate commerce" or were made over facilities "used in local distribution." Each such application was totally denied. The collective denials were eventually justified not on the grounds prescribed by Commission Rules and applied to Staff requests for discovery (materiality and relevancy),* but rather on the basis that I & M "ha[d] shown no need for pre-hearing discovery" (R. 16549).

During the subsequent hearing, petitioner was consistently foreclosed from attempting to demonstrate its belief that FPC's own experts had for thirty years considered the sales in question to not be in interstate commerce and that some still did. Such a showing of continuing administrative interpretation of the Act, it was felt, would be pertinent to the weight to be given the contrary conclusion of the one expert who did testify (R. 2316), especially since it was conceded that petitioner's operations had remained unchanged in principle for over two decades (R. 1449, 16183), and that during that time there had been

* Indeed, it was conceded at least twice (R. 16061, 16207) that much of the material I & M sought related "to issues raised by the Order to Show Cause herein and various other specified orders and official communications of the Commission."

no relevant engineering or scientific breakthroughs known to that expert (R. 2320-21).

After extensive hearings, the Hearing Examiner, Commission and two judges of the Court below each concluded, for various and different reasons, that the sales in issue were jurisdictional.

Reasons for Granting the Writ

1. The Commission's denial to petitioner of a right to prehearing and in-hearing discovery equal to that afforded to its own Staff is such a departure from the accepted and usual course of judicial and administrative proceedings as to call for an exercise of this Court's power of supervision.

Petitioner and its affiliates were in possession of much of the factual data required by Commission's Staff to analyze the jurisdictional problems in this case. Similarly, the Commission Staff was the only repository of the specialized studies and information necessary to apply engineering principles to such data. As the only Staff engineering witness conceded, "the field of jurisdiction, or engineering involving jurisdiction, is very specialized and very narrow, and there are very few opportunities where such information could be used or of value" (R. 1564).

During the prehearing period, Staff was afforded access to voluminous data of Petitioner and other affiliated or interconnected electric systems, several thousand pages of which were included by Staff in the record of this proceeding. At the same time, Petitioner vainly sought either oral or documentary discovery relating to applicable engineering studies and reports from some appropriate person at the only available source—the Commission Chairman (who was

publicly announcing what appeared to be new administrative standards for determining jurisdiction*), or the Commission Secretary (who was the logical custodian of much of the information sought), or a Staff expert who was known to possess much of the information sought (R. 15705-721).

By virtue of Section 12 of the Administrative Procedure Act, 5 U.S.C.A. §1011, Petitioner had a right to take pretrial depositions under Federal Power Act §307(d) and to seek both oral and documentary pre-hearing discovery under Section 1.23(a) of the Commission's Rules of Practice and Procedure (18 C.F.R. §1.23(a)) on terms equal to those afforded the Commission Staff. The Commission has justified its disparate treatment of Petitioner and its own Staff with regard to prehearing discovery on the ground that Petitioner had shown "no need" for such discovery (R. 16549). In judging this excuse, however, it must be remembered (1) that the rules, which are required to be followed in hearings by Section 308(a) of the Power Act, provide that the standards for judging such applications should be materiality and relevancy—not "need", and (2) that while those and only those prescribed standards were applied to the Commission Staff's prehearing applications, the additional, illegal and probably impossible, test of "need" was applied to Petitioner's numerous applications despite the Administrative Procedure Act's injunction that "all requirements and privileges relating to evidence or procedure shall apply equally to agencies and persons."

* See, *e.g.*, Swidler, Joseph C., Chairman, Federal Power Commission, "Electric Power Interconnections and Grid Systems", address before the National Association of Railroad and Utilities Commissioners, New Orleans, Louisiana, November 14, 1962; Hearings on H.R. 8747 before the House Sub-committee of the Committee on Appropriations, 88th Cong., 2d Sess. (1964), p. 339.

The U. S. District Court for the Northern District of Indiana* has well characterized Petitioner's position in a statement quoted in part in the dissent below.

> "* * * this Court is not unmindful of the fact that the record in the instant case constitutes an alarming example of how a private litigant before an administrative agency may be denied the opportunity to pursue the orderly procedures so vital to our traditional notions of fair play. Contentions advanced by counsel for the Commission throughout the hearings in this cause afford this Court no nourishment to hold as we must. Counsel for the Commission contended that the plaintiff did not specifically designate the various documents sought. It would be strange, indeed, if the plaintiff could designate the dates and authors of the various engineering reports which it has never been given an opportunity to examine. Likewise, the possibility of permitting restricted discovery on the day of trial affords the experienced trial practitioner no effective remedy at all. This is especially true where much of the data sought consists of long and detailed engineering and rate studies." *Indiana & Michigan Electric Co.* v. *FPC*, 224 F. Supp. 166, 170 (N.D. Ind. 1963).

This situation was aggravated by the limited cross-examination permitted at the hearings. For every time Petitioner established the existence of a document relating to engineering or scientific standards or data employed in determining FPC jurisdiction, the inquiry was forthwith foreclosed, production of the documents denied,

* Petitioner had sought to enforce its believed right to equal treatment and prehearing discovery in the United States District Court for the Northern District of Indiana; the Court reluctantly held that, since Petitioner had not then exhausted possible administrative remedies, it did not have jurisdiction to grant such relief.

and the names of FPC engineers who had prepared the documents, employed the standards or made the determinations, uniformly withheld. As a result it was made impossible to subpoena these people or otherwise to show from objective evidence that under the standards employed by FPC in *every* previous case to determine the extent of its jurisdiction the sales in issue were considered by FPC's own experts for 30 years to be in intrastate commerce.

Such proof would be highly pertinent to the weight to be given the new and different conclusion reached in this case, especially when it rests so heavily on the Commission's presumed, but adamantly unexplained, expertise in this field, and upon legal standards which, at the very least, depart from continuously applied FPC interpretations as well as from the established course of decisions by this Court (*infra*).

The Commission's determination in this, an adversary proceeding, to afford its Staff access to virtually all data available to Petitioner, and to deny Petitioner in the preparation and presentation of its case access to necessary data and knowledge freely available to its Staff, merits careful review by this Court.

2. The basis for FPC jurisdiction applied in this case, and the rejection of the "local distribution" exemption, by both the Commission and the court below are in conflict with both the Federal Power Act and prior holdings of this Court.

A. Under Section 201(b) of the Federal Power Act, FPC jurisdiction over wholesale sales is initially limited to those wholesale sales which are made "in interstate commerce." Section 201(c) goes on to explain that for the

purpose of the Act, electric energy shall be held to be transmitted in interstate commerce when transmitted from a State and consumed at a point outside thereof.

In its most recent opinion concerning FPC jurisdiction, this Court said:

> "We said in *Connecticut Co.* v. *Federal Power Comm'n.*, 324 U. S. 515, 529, 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.' And that is the test we have followed under both the Federal Power Act and the Natural Gas Act. * * *" *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366, 369 (1965)

Similarly, see *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 209 n. 5 (1964).

The determinative basis of jurisdiction applied by the Commission, on the other hand, did not even purport to follow "the flow of electric energy".

> "* * * where a public utility participates in and is dependent upon an integrated interstate power pool, all of its wholesale sales for resale are subject to the jurisdiction of this Commission." (R. 16538)

Similarly, two judges of the Court below approved that basis (p. 7a, *infra*) and explicitly "reject[ed] I & M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must * * * prove * * * that out-of-state energy reaches the wholesale customers" (p. 8a, *infra*).

This departure from and rejection of "the test [this Court has] followed under both the Federal Power Act

and the Natural Gas Act" merits careful review by this Court, particularly in view of the significance of this case for future jurisdictional proceedings.*

The intimation of the Court below that this test was met with respect to Petitioner's Indiana sales (p. 6a, *infra*) is not supported by substantial evidence. Briefly, any such determination from the record herein must rest either upon (1) the characteristics of interconnected elec-

* The significance of this case was recognized during the hearings, when the presiding Examiner characterized the case as "of great importance, not only to the Commission, but to the entire industry" (R. 2212); subsequently, it has been noted that "It is evident that the Commission has adopted, in *I & M* and subsequent decisions [predicated thereon], a rationale for asserting jurisdiction which is at variance with both its former practice and the test presently approved by the Supreme Court." NOTE, Electric Utility Jurisdiction of the Federal Power Commission, 40 N. Y. U. L. Rev. 1129, 1153 (1965).

FPC has already made clear that it intends to rely upon this case in the future to assert jurisdiction over virtually all wholesale sales, by employing it to claim jurisdiction over all wholesale sales by electric utilities interconnected directly or indirectly with electric utilities in other states. It relied upon the rule first expressed in this case to assert jurisdiction over wholesale sales of three other utilities within a year of its decision in the present case. *Arkansas Power & Light Company*, 60 P. U. R. 3d 1 (1965); *Public Service Co. of Indiana*, 62 P. U. R. 3d 65 (1965); *Cincinnati Gas & Electric Co.*, 62 P. U. R. 3d 179 (1966).

The test announced in this case will be employed by FPC in all foreseeably subsequent jurisdictional proceedings, because virtually all that is required in the way of proof is a showing that the customer in question is connected, directly or otherwise, to an out-of-state source of electric energy. The effect of this new test is to repudiate the words of this Court in *Jersey Central Power & Light Co.* v. *FPC*, 319 U. S. 61, 72 (1943) that "Mere connection determines nothing." Indeed, in *Arkansas Power & Light*, FPC took the position that "a purely negative showing of the absence of measurable interstate flow" of electric energy to a sale, based upon the method accepted by this Court as substantial scientific and engineering proof of jurisdiction in *FPC* v. *Southern California Edison*, would not defeat jurisdiction, "no matter how comprehensive". 60 P. U. R. 3d at 6.

tric system operation dealt with at length by the Commission and the Court below, or (2) a method of analysis of possible electric energy flows described as commingling. As to (1), the Commission conceded in its brief to the Court of Appeals (p. 32) that such characteristics were not relied upon or put into evidence to show that out-of-state energy reached the individual customers. As to (2), the witness sponsoring the presentation admitted that the data upon which it is predicated "do not even suggest or tell what happened during the hour for which the data were used" (R. 1785) and that the analysis itself "does not consider what may be the actual arrangement or the actual movement of the energy within the circuits" of an electrical system (R. 1829).

B. Section 201(b) of the Federal Power Act also provides that "The [Federal Power] Commission * * * shall not have jurisdiction * * * over facilities used in local distribution." This Court has twice made it clear that in its view this prohibition exempts from FPC jurisdiction sales made over facilities used in local distribution. (1) In *FPC* v. *Southern California Edison Co., supra,* it said:

> "We hold that §201(b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce *not expressly exempted* by the Act itself,[6] * * *
>
> [6]Section 201(b) expressly *excludes* FPC jurisdiction 'over facilities used in local distribution.' * * * Whether facilities are used in local distribution—although *a limitation on FPC jurisdiction* and a legal standard that must be given effect in addition to the technological transmission test [citing *Connecticut Light & Power, supra*]—involves a question of fact to be decided by the FPC as an original matter." 376 U. S. at 210 (Emphasis added)

(2) In *California* v. *Lo-Vaca Gathering Co., supra,* this Court relied upon *Connecticut Light & Power, supra,* for

the proposition that "Federal jurisdiction was to follow the flow of electric energy. * * *" The Court continued: "And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself has substituted a so-called legal standard for the technological one. *Id.*, at 530-531." The cited pages in *Connecticut Light & Power* discuss the local distribution exemption.

FPC's holding that "nothing in the Power Act * * * makes [Federal Power] Commission jurisdiction over sales dependent on whether the facilities used are local distribution facilities" (R. 16548) is directly contrary to both the statute and the two most recent opinions of this Court, as is the holding of the Court below that "The exemption for local distribution facilities applies to a company's status as a public utility and not as to the Commission's jurisdiction over sales in interstate commerce for resale" (p. 8a, *infra*). These departures from the statute and prior opinions of this Court also merit careful review.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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